In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1249

GRAHAM BOBBITT BALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966. The petition for a writ of certiorari was filed on April 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in revoking petitioner's probation by relying, in part, upon the fact that petitioner had misrepresented facts at a previous hearing.

218-501—66

2. Whether the court improperly relied upon hearsay in revoking probation.

STATEMENT

On June 8, 1962, petitioner pleaded guilty in the United States District Court for the Eastern District of North Carolina to two counts of an indictment charging concealment and possession of nontaxpaid whiskey. He was sentenced to imprisonment for three years on Count 1 and one year on Count 2, the terms to run consecutively. Execution of the sentences was suspended and petitioner was placed on probation for five years. Among the terms of the probation were that petitioner not violate state penal laws, that he live a clean and temperate life, and that he keep good company (Pet. App. 2A).

On August 12, 1964, at a hearing to determine whether petitioner's probation should be revoked for violating these three conditions, the court continued probation but instructed the probation officer to make further inquiry into the charges and report his findings at a subsequent hearing. At the second hearing, in June, 1965, the court revoked petitioner's probation, ordered him to serve 6 months in prison, and placed him on probation for two years thereafter. The court of appeals affirmed (Pet. App. 1A–8A).

At the first probation revocation hearing, in August, 1964, the probation officer stated that, on June 9, 1964, he had received an anonymous telephone report that petitioner had been drinking and driving through the community in that condition (Tr. 4).[1] The officer

[1] The three-volume record, including the transcript of trial, has been filed with the Clerk of this Court.

conducted an investigation and interviewed approximately a dozen neighbors and acquaintances of petitioner, all of whom he considered reliable (Tr. 4). He concluded that there was reason to believe that from June 5 to June 8, 1964, petitioner had violated the terms of his probation by appearing in public and driving while intoxicated and by associating with individuals of questionable reputation (Tr. 3–8). The officer also reported that on June 7, petitioner intervened to prevent a fight in his grocery store between two individuals, one of whom, Nash, had an undesirable reputation (Tr. 7). Later that day petitioner rode to Louisburg, North Carolina, in the company of Nash and two others, one of whom was intoxicated. The driver, Lancaster, refused to pay for gasoline at a service station, and engaged in a fight with the service station attendant. Petitioner separated the combatants. Lancaster and the intoxicated passenger, who both had extensive criminal records, were arrested (Tr. 5–6, 42). On the morning of the next day, June 8, petitioner was seen on a rural road two miles from his home slumped over in his car while the motor was running. A neighbor drove him home (Tr. 7).

Petitioner denied drinking at any time during the period of time in question. He admitted being compelled to intervene in two fights on June 7. The first occurred at his grocery store between customers. As to the second incident, petitioner stated that Lancaster had come to his house to request a purchase from petitioner's store, which was closed; that petitioner accepted a ride to the store; that against petitioner's wishes Lancaster drove to Louisburg, where the alter-

cation occurred; and that petitioner was not involved in the fight (Tr. 14). With regard to the incident on the highway, petitioner stated that he had a tooth extracted on June 6, and that the dentist had given him a prescription for drugs which placed him under heavy sedation and may have caused him to appear intoxicated. Petitioner further stated that he had gone to a hospital in connection with the tooth extraction on the morning of June 8, 1964, where a piece of jaw bone was removed (Tr. 20).

After hearing this evidence and the testimony of one of the eleven available character witnesses on behalf of petitioner, the court gave petitioner "the benefit of every doubt" and continued him on probation. The judge requested the probation officer to interview the dentist who petitioner alleged had extracted his tooth and to report his findings (Tr. 39–45).

A second hearing was held on June 3, 1965. The dentist testified that, on June 6, 1964, petitioner came to his office at 6:30 a.m., complaining of an infected tooth, and was given a prescription for tablets to relieve pain. The tablets contained no narcotics and were merely a compound of aspirin (Tr. 85, 87). The dentist did not see petitioner again until after 9 p.m. on June 8, when he performed the extraction (Tr. 73-75). The probation officer advised the court that his examination failed to uncover any recent hospital record for petitioner (Tr. 4, 54). Petitioner, through counsel and later by his own testimony, admitted that he had been "mistaken" about his trip to the hospital (Tr. 71, 101)). He insisted, however, that he was under the influence of various tablets which he had

taken to excess to relieve the pain of the bad tooth (Tr. 110–115). The court expressed its concern that petitioner had changed his story, and revoked petitioner's probation on four grounds: failure to follow the probation's officer's instructions and advice; violating a state law; failing to keep good company; and misrepresenting facts at the August hearing (Pet. App. 6A).

ARGUMENT

1. Petitioner does not dispute the fact that intentional misrepresentations of fact on his part at the first hearing would afford a basis for subsequent revocation of his probation. He urges, however, that, at the first hearing, "[n]either the probationer nor his attorneys had any knowledge of any of the charges except the altercation at the filling station in Louisburg, N.C., and therefore the probationer was called upon without any prior notice to give the details of his severe toothache * * *" (Pet. 7–8) and thus that his misstatements at the first hearing regarding the tooth extraction and its surrounding circumstances were "nothing more than a mere erroneous statement of immaterial facts due entirely to lack of notice and knowledge on the part of the probationer and his attorneys as to what the charges were against him" (Pet. 14).

The question whether petitioner deliberately misrepresented facts at the first hearing was an issue of fact primarily entrusted to the resolution of the trial judge who presided at both hearings. Both the judge and the court of appeals (Pet. App. 7A) concluded that the representations had, in fact, been designed to

mislead the court. There is no occasion for further review of this factual determination, especially in light of the fact that the first hearing took place less than three months after the incident in question, when petitioner's memory of the facts could be expected to be relatively reliable. Finally, the alleged failure of formal notice, prior to the first hearing, that the events surrounding the tooth extraction would be relevant, obviously did not privilege petitioner deliberately to lie about those events. Cf. *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955.

2. Nor is there merit to petitioner's contention that the revocation of his probation—insofar as it was grounded upon bases other than his misrepresentation of facts at the first hearing—improperly rested entirely upon hearsay (Pet. 14–16). At the second hearing, the court advised defense counsel that he would not require a confrontation, but would rely on the report of the probation officer, who knew that he must discount mere rumor when making his investigation and recommendations. Counsel voiced no objection to this procedure (Tr. 68). Moreover, petitioner did not deny his association with disreputable characters or his unfit condition on a public road, but offered an explanation for his actions which the judge deemed unsatisfactory. Each charge against petitioner was fully and individually considered. Petitioner was adequately represented by counsel and had a full opportunity to present his version of the facts through his own testimony. See *Manning* v. *United*

States, 161 F. 2d 827 (C.A. 5), certiorari denied, 332 U.S. 792.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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